

STATE OF MICHIGAN
COURT OF APPEALS

C & G PUBLISHING d/b/a TROY TIMES,

Plaintiff-Appellant,

v

CITY OF TROY,

Defendant-Appellee.

UNPUBLISHED

March 23, 1999

No. 207627

Oakland Circuit Court

LC No. 97-538369 CZ

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Plaintiff filed a motion for summary disposition on its Freedom of Information Act (FOIA) claim. Summary disposition for plaintiff was denied, and the trial court instead granted summary disposition in favor of defendant pursuant to MCR 2.116(I)(1)¹. Plaintiff's motion for reconsideration was subsequently denied, and it appeals as of right. We reverse and remand.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1995). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id.* Affidavits, pleadings, depositions, and any other documentary evidence is considered by the court when determining whether a genuine issue of material fact exists. *Id.*

In the present case, defendant's initially denied plaintiff's request for a "copy of the most recent written job evaluation" of defendant's city manager. In denying the request, defendant cited to an exemption found within the FOIA, MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.* Plaintiff thereafter renewed its request, claiming that the exemption did not apply. Defendant then granted the request and sent plaintiff documents, stating that it was enclosing "City Manager James C. Bacon's most recent written job evaluation." After reviewing the documents, plaintiff realized that they did not contain a city council evaluation or assessment of Bacon's job performance. Plaintiff then sent defendant a third, very specific letter, requesting the immediate release of documents it believed existed. The request identified questionnaires, which apparently contained fifty questions regarding Bacon's performance, that were allegedly filled out by city council members, who rated Bacon on a scale of one to five. Plaintiff also requested the document, which compiled the individual evaluations and showed the average rating for

each of the fifty questions. Defendant failed to respond to this third request at all, and plaintiff filed suit alleging a breach of the FOIA. Eventually, plaintiff filed a motion for summary disposition requesting that the Court order release of the individual questionnaires and the overall compilation of those questionnaires, as well as costs and attorney fees, and punitive damages for the breach. Defendant responded and claimed that the individual rating sheets were not in its possession, and that there was no document consisting of fifty questions, which represented the most recent job evaluation of Bacon. In fact, defendant argued that "no actual final evaluation" of Bacon was in existence. Finding that the documents that plaintiff sought were not available through Bacon's personnel file or the city attorney's office, the trial court concluded that the FOIA had not been violated. It granted summary disposition to defendant.

Pursuant to the FOIA, all persons, except prisoners, are entitled to full disclosure regarding the affairs of government and acts of officials and employees so that they may fully participate in the democratic process. MCL 15.231(2); MSA 4.1801(1)(2); *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543-544; 475 NW2d 304 (1991); *Schroeder v Detroit*, 221 Mich App 364, 365; 561 NW2d 497 (1997). Upon a sufficiently descriptive request, a person has the right to inspect, copy or receive copies of any nonexempt public records. MCL 15.233(1); MSA 4.1801(3)(1). Within five days of the request, the public body to which it is directed must either, grant the request; deny the request in writing; grant the request in part and deny it in part in writing; or issue a notice to extend the time to respond. MCL 15.235(2); MSA 4.1801(5)(2). A public body's failure to timely respond to a request constitutes a denial, MCL 15.235(3); MSA 4.1801(5)(3); *Hartzell v Mayville Community School Dist*, 183 Mich App 782, 786; 455 NW2d 411 (1990), and is a violation of the Act. *Local 312 of the American Federation of State, Co, and Municipal Employees, AFL-CIO v City of Detroit*, 207 Mich App 472, 474; 525 NW2d 487 (1994); *Hartzell, supra* at 786. The fact that requested documents are nonexistent is not a defense to the failure to respond to a request for a document. *Id.* at 787.

Based on the facts presented to the trial court in this case, it was undisputed that defendant failed to respond to plaintiff's third request for information concerning the city council's performance evaluation of Bacon. Defendant's failure to respond violated the FOIA. *Local 312, supra*; *Hartzell, supra* at 786-787. Defendant forced plaintiff to file suit to obtain the requested documents, which ended up being nonexistent or unavailable to the public body. Had defendant responded pursuant to the requirements of the FOIA, it would not have been necessary for plaintiff to bring this action in order to learn that the questionnaires were not available and that a final compilation did not exist. In *Hartzell, supra* at 787, the Court stated:

The FOIA is a "disclosure statute." We deem that the disclosure required is not limited to the production of an existing document but, consistent with the requirements of MCL 15.235(2) and (4); MSA 4.1801(5)(2) and (4), also includes the disclosure that the requested document does not exist. It is inconsistent with the purposes of the FOIA for a public body to remain silent, knowing that a requested document does not exist, and force the requesting party to file a lawsuit in order to ascertain that the document does not exist. [Citations omitted.]

Because defendant clearly violated the FOIA, plaintiff prevails on its claim.

We also note that any assertion by defendant that the requested information fell within an exemption available under the FOIA would not absolve it of the consequences of its procedural violation. See *Local 312, supra*.

Like the Court in *Hartzell, supra* at 787, we cannot obviously order the production of nonexistent or unavailable documents. We do, however, determine that the trial court erred in finding that defendant did not violate the FOIA, and we remand for entry of an order granting summary disposition for plaintiff. Pursuant to the FOIA, MCL 15.240(4); MSA 1801(10)(4), plaintiff is also entitled to an award of reasonable attorneys fees, costs and disbursements. *Hartzell, supra* at 787-789. We remand for a determination of reasonable costs and attorney fees, including costs and attorney fees for this appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael J. Kelly
/s/ Harold Hood

¹ The trial court cited to MCR 2.116(I)(1) when granting summary disposition to defendant. The trial court should have, however, utilized MCR 2.116(I)(2), which applies when a trial court is granting summary disposition to a nonmoving party, like defendant in this case.